
In the
United States
Circuit Court of Appeals
For the Ninth Circuit

JUNEAU FERRY & NAVIGATION COMPANY,
a Corporation,

Appellant.

vs.

C. P. MORGAN, Et Al,

Appellees.

UPON APPEAL FROM THE DISTRICT COURT
FOR ALASKA DIVISION NUMBER ONE.

Brief for the Appellants

J. H. COBB,

Attorney for the Appellant.

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STATEMENT OF THE CASE.

C. P. Morgan, R. B. Cochran and H. Johanson, Co-partners, doing business as the Island Ferry Company, filed their Bill against the Juneau Ferry & Navigation Company, a Corporation, alleging in substance as follows:—

That on November 1st, 1915, the Common Council of the Town of Douglas made and executed a good and sufficient lease, (a copy of which was attached to the Bill as Exhibit A.) to the plaintiffs, whereby the said Common Council leased to the plaintiffs a certain float and premises, and that the plaintiffs, by virtue of said lease, took quiet, undisturbed and peaceable possession of said leased property from the 6th day of November, 1915, up to the 13th day of November, 1915.

That on the 13th day of November, 1915, the defendant, wholly disregarded the rights of the said plaintiffs under said lease, and after notice from the plaintiffs both oral and written, and after notice in writing served upon the defendant to the town of Douglas, a copy of which notice is attached to the Bill and marked Exhibit B., the defendant wrongfully, wilfully and maliciously, and in total disregard of plaintiffs' rights therein, entered upon said float and premises by landing their ferry therein, for the purpose of discharging freight and passengers and loading freight and passengers, to the ex-

clusion of plaintiffs, and to their damage as herein-after alleged;

And it was further alleged that the defendant owned and operated, and does own and operate, a ferry or ferries between the towns of Juneau and Douglas, Alaska, for a number of years past, and that it also owns and controls a good and sufficient float and landing at the town of Douglas, Alaska, and that it has at all times exclusively used its own float for landing its boats for ferry purposes, and that the defendant's float and landing is better located and of superior construction to the float and landing owned, used and controlled by the plaintiffs;

And it was further alleged that the landing and trespass upon the float and premises owned and controlled by the plaintiffs by the defendant was for the purpose of depriving the plaintiffs of their rights and injuring them, and that it was damaging them approximately Fifteen (\$15.00) dollars per day, and that unless the defendant was enjoined from continuing said acts, plaintiffs would be further damaged in the sum of upwards of Thirty-Five (\$35.00) dollars per day;

Plaintiffs further allege they had no clear, speedy or adequate remedy at law, and pray that the defendant be enjoined from landing at, occupying or trespassing upon said float and premises, or in any manner interfering with the plaintiffs exclusive possession of the said float and premises, and for such

further relief as to the Court shall seem just and equitable in the premises and also pray for a temporary Restraining Order pending the hearing.

(Record pp. 1-11)

The lease attached to the Bill as Exhibit A. was a lease in ordinary form, for a period of one year, to "that certain float and landing adjoining the City Dock on the North side of the same, together with all piling and structures incident and appertaining to the same and necessary for the maintenance of said float, and also the gangway and necessary approaches to said float, with the right of ingress and egress to and from said float by land and water." It was executed by the City of Douglas, a Municipal Corporation, by Peter Johnson, President of Common Council and ex-officio Mayor, and purported to be in consideration of the payment of Twenty-five (\$25.00) dollars per month.

(Record pp. 5-7)

Upon the verified Bill, the Court made and entered an Order, November 15th, 1915, commanding the defendant to show cause why an Injunction *pendente lite* should not be issued as prayed for in the Complaint, and in the meantime the defendant was restrained from landing its ferry boats at the float. The Order was

(Record pp. 12-13.)

made returnable November 22nd, 1915. The defendant appeared, and filed an Answer to said Rule

to show cause, wherein it alleged that the plaintiffs do not state facts sufficient to authorize the issue of any injunction, temporary or otherwise, in this: that it appears from said Complaint, and the Exhibit attached thereto, that the Plaintiffs are claiming the right to the exclusive possession and use of the float mentioned in the Complaint under a pretended lease from the City of Douglas, Alaska, which said lease purports to be executed by Peter Johnson, President of the Common Council and ex-officio Mayor of the City of Douglas, while the said Peter Johnson as a matter of law, had no authority to execute said lease, and there are no facts alleged showing any such authority to have been given him; and that the City of Douglas, or its Common Council, had no legal authority to execute the pretended lease to the said dock alleged in the said Complaint or any lease to said dock or float owned by said Municipality, to the exclusion of others desiring similar accomodation thereat.

(Record pp. 15-17.)

And it was further alleged that the defendant was engaged in the business of operating a ferry between the towns of Juneau, Douglas, Treadwell and Thane, all on Gastineau Channel, a navigable arm of the Pacific Ocean, and has been so engaged for more than twenty years last past; and it has invested in its vessels and other appurtenances in connection with said business, a sum of upwards of Fifty thousand (50,000.00) dollars; that the float referred to in

the complaint is a part of the public dock on the navigable waters of Gastineau Channel, constructed by the Municipality of Douglas City, Alaska, some years ago, under the authority contained in the Alaska Civil Code, authorizing municipalities to provide for the construction and maintenance of streets, alleys, sewers and wharves; that said authority, as the defendant is advised, and therefore alleges, only permits the construction and maintenance of such wharves for the use of the general public desiring accommodation thereat, and does not authorize the granting of a special or exclusive privilege to any person or corporation; that a part of the public served by the defendant finds that it is more convenient to land at said float than elsewhere, and the defendant is and has ever been ready and willing to pay all reasonable charges to the City of Douglas, when it shall have established a regular charge for the use of said float, as one of its landing places for the accommodation of the general public.

That the defendant further alleges that it was the purpose and intention of the Common Council of the City of Douglas and of the plaintiffs, in executing said pretended lease, to give to the plaintiffs a special privilege and advantage for the operation of their said ferry boat, to the detriment of the general public seeking transportation to and from said town, and especially to the detriment of the business of the defendant.

And the defendant further alleges that if the

injunction prayed for was granted, it would result in giving to the plaintiffs a special and exclusive privilege for the use of public property and part of the public highways of the said City of Douglas, and a part of the public highway leading from said City to the Outside world, and would result in a great and continuing damage to the business of the defendant.

(Record pp. 15-17)

The Cause came on to be heard upon the Bill, the Rule to Show Cause and the Answer thereto, and thereupon oral evidence for both sides was introduced, all of which is found in the Record

(Record pp. 21-95)

and in substance establishing the following state of fact, stated chronologically, rather than an attempt to follow the order of the testimony itself, because, while the testimony covers some 75 printed pages of the Record, the ultimate facts are comparatively brief.

The Juneau Ferry & Navigation Company had been operating a ferry between Juneau, Douglas, Treadwell and Thane (formerly Sheep Creek), all on Gastineau Channel, for many years past. Prior to the year 1909, the Ferry Company owned the only dock and float or ferry landing at Douglas, and it not only was engaged in the ferry business, but also in the wharfage business, maintaining a wharf for ocean-going vessels. In the year 1909, the City of Douglas began the construction of a City Dock, for

the purpose, as stated by Mr. O'Connor, the then Mayor of the town, "to break the monopoly that existed by the Juneau Ferry & Transportation Company."

(Record p. 22.)

At that time, a float was built on the North side of the main dock, which float was afterwards removed to the South side, and its dimensions increased, for the purpose of being used by the fleet of small boats as a place to tie up at, the South side of the dock being much the most sheltered, but being, on the whole, too shallow, and otherwise inconvenient for ferry purposes.

About 1911, the float in controversy was given to the Town by a Mr. Murray, and the Town, at its own expense, had it put in on the North side, and this was done by the City for the purpose of offering inducements for an opposition ferry to land.

(Record p. 33.)

The float was used generally by the public from the time it was put in until November 1st, 1915. But the inducements offered were not sufficient, apparently, to cause any independent ferry to start in opposition to the business of the defendant until the Summer of the year 1915. Within the last two or three years, however, there was a general increase in the travel between Douglas Island ports on the small boats and ferries, such travel considerably more than doubling. (Record p. 78-79.) So in the

summer of 1915, a ferry was started by the gas boat "Rex."

(Record p. 60.)

Prior to the time that the "Rex," the predecessors of the Island Ferry Company, the plaintiffs, began operations, the fare between Douglas and Juneau was Twenty-five cents (25c), and thereafter it was reduced to Fifteen cents (15c).

(Record p. 57.)

About the 3rd of October, 1915, the Juneau Ferry & Navigation Company began landing the "Teddy," one of their vessels, at both their own dock and the City float or dock, at which time the said dock or float of the City was being used by the public generally, that is, by all the small boats desiring its use operating on the Channel. The reason for this action on the part of the Ferry Company was that many of its patrons, especially the Indians, found it more convenient to use the City Dock in taking or leaving the Ferry than the float of the Juneau Ferry & Navigation Company, and, in order to serve this business, the landings were made at both docks.

(Record pp. 87-88.)

On November 1st, 1915, the following proceedings were had in the City Council of Douglas City, as shown by the minutes, to-wit, "Motion made and seconded, that the North float, Douglas City wharf, be leased to the Island Ferry Company for one year at a rental of Twenty-five Dollars per month, payable in advance. Motion carried." (Record p. 52.)

No authority was shown from the City Council authorizing Peter Johnson to sign the corporate name of the Town to the lease or to execute it, but it appears that the Mayor did sign the lease, a copy of which was attached to the Complaint, on the 13th day of November, 1915, and two days thereafter this suit was brought. There was no proof whatever that there was any interference by any of the defendant's boats with any boats or business of the plaintiffs, except that on one occasion there was a slight difficulty in getting in and out, due principally to a strong tide. (Record p. 58.)

The Court granted the Temporary Injunction prayed for. (Record pp. 18-19.)

The defendant assigned Errors, and appealed from said Order. Errors assigned are two. (Record p. 97.)

ASSIGNMENT OF ERRORS.

I

The Court erred in granting the Temporary Injunction prayed for, for the reason that the evidence conclusively showed that the float or dock mentioned in the Complaint and Restraining Order was a public dock, acquired by the City of Douglas for public purposes that the same had been used for public purposes for several years past, and that the Common Council of the City of Douglas was without power to grant and convey an exclusive lease thereof to the plaintiffs.

II.

The evidence conclusively showed that the plaintiffs and appellees had no lease to the float and dock mentioned in the Complaint, and were not entitled to the exclusive use thereof.

ARGUMENT.

First. The first and most important question we desire to present is, *WHETHER OR NOT A CITY COUNCIL OF A MUNICIPALITY IN ALASKA, HAS THE POWER TO SELL OR LEASE A PUBLIC FLOAT OR DOCK?*

The powers given to Municipalities in Alaska are, among others, the following, "That the said Common Council shall have and exercise the following powers Fourth, to provide for the location, construction and maintenance of the necessary streets, alleys, crossings, sidewalks, sewers and wharves."

(Sec. 627, Compiled Laws of Alaska, p. 318.)

This is all the statutory law bearing upon the question in Alaska.

Now, it is manifest that this power to construct or acquire streets, wharves, etc., is to provide for public needs, and property so acquired becomes affected with a public use, and is held in trust for the use of the City, and as such cannot be disposed of by the City Council, so long as this use continues.

"A Municipality owns its avenues, streets and alleys in trust for the general public, and has no

general or implied power to convey them or pervert them to other use. . . . In some States it has been held that a Municipal Corporation holds its public wharves as it does its streets, and that it has no power to sell or lease them to private persons, in the absence of special statutory authority. In other States, the contrary has been held, on the ground that the wharves are not highways, but private property of the Municipality."

28 Cyc. 624.

The reason for the contrary ruling certainly does not apply in Alaska, where as in the case of Douglas City, the only highway to and from the city and the outside world is necessarily over its wharves.

The two cases cited holding that wharves are private property of a Municipality, and as such may be sold are

Horne v. People, 26 Mich. 221,

Thompson v. New York, 11 N. Y. 115

The great weight of authority, as well as reason, appears to be the other way.

Mr. McQuillan, in his valuable and exhaustive work on Municipal Corporations; lays down this fundamental rule:

"The legal conception early obtained that the powers possessed by public and municipal officers 'must be viewed as public trusts, not conferred upon individual members for their own emolument, but for the benefit of the com-

munity over which they preside.' Therefore, the principle is fundamental and of universal application that public powers conferred upon a municipal corporation and its officers and agents cannot be surrendered or delegated to others."

(McQuillan, Munc. Corp., Vol 1,
Sec. 382.)

And in treating of municipal wharves, the learned author says:

"Inasmuch as the supreme, or ultimate control over such public places as wharves is vested in the legislature of the state, the authority of a municipal corporation over them is derivative and incapable of being delegated. Hence, a city may not adopt by-laws or pass ordinances or enter into contracts which cede away control or embarrass the state in its legislative or governmental powers and duties. Thus a city cannot lease its wharves, or farm out its revenue, or empower any person or corporation to fix the rates of wharfage. Nor can it lease land which it has condemned for wharf purposes for a term of years, without conditions, to be devoted to private uses. Accordingly, it has been properly held that a grant of power to a municipality 'to provide for the location, construction and maintenance of necessary wharfage' does not authorize an incorporated town in Alaska to grant a franchise to individ-

uals to build wharves on the public streets and navigable waters abutting thereon, and collect tolls for their use.

The controlling principle, as stated and explained elsewhere, is that public powers conferred upon a municipal corporation and its officers and agents cannot be surrendered or delegated to others. Nor is a city vested with any proprietary interest in wharves by reason of power conferred on the mayor and common council 'to erect, repair and regulate public wharves and docks and to regulate the erection and repair of private wharves and to fix the rates of wharfage thereat.' "

(Supra, Section 400.)

Among the cases cited in the text of the learned author is that of *Conradt vs. Miller*, 2 Alaska, 433. In that case the town of Chena had attempted to lease a part of its water front on the Tanana River for the purpose of enabling the lessee to construct a public wharf thereon, to be operated by said lessee. The Court held that—

"Incorporated towns in Alaska have power 'to provide for the location, construction, and maintenance of the necessary wharves, and to provide for wharfage.' Held, that this grant did not empower the town council to grant a franchise to individuals to build wharves on the public streets and navigable waters abutting

thereon, and to collect tolls from the public for using the same."

The case of *Roberts v. City of Louisville*, 13 L. R. A. O. S., 844, is an instructive one. The suit was for an injunction against the passage of a municipal ordinance authorizing the transfer of a wharf owned by the city in trust for the public. In that case the Court said:

"The power of a municipal corporation to acquire land for the purpose of erecting wharves thereon, and to charge wharfage, is not a necessary incident of its character, but must, like all its other powers, be derived directly from the Legislature; of course to be exercised within the limits and upon conditions of the grant. *Dillon, Mun. Corp. Sec. 110.* And, looking to the nature and purpose of such special grant, it must be regarded as a trust, involving duties and obligations to the public and individuals which cannot be ignored or shifted; for the power to acquire implies duty of the municipality through its governing head, to maintain and preserve wharf property for the benefit of the public, without discrimination or unreasonable charges for individual use. In every instance, so far as we have observed, wharf property of the City of Louisville has been acquired under Act of the Legislature, and paid for by taxation; and in no case is there evidence of legislative intention that it should be held otherwise than in

trust for use of the public, and in aid of trade and commerce. The wharf property being so held, the City of Louisville cannot transfer its title or possession, nor, according to a plain and well settled principal, can the general council, which is by statute invested with power of control, and burdened with duty of maintaining, preserving, and operating the wharves, either delegate the power or disable itself from performing the duties."

The same doctrine is announced in *Bateman v. Covington*, 14 S. W, Rep. 361, *Illinois etc. Ry. Co. vs. St. Louis*, 12 Fed. Case, 7007; *Murray vs. Alleghany*, 136 Fed. 57.

Second: It is manifest that the lease attached to the complaint and relied upon by the plaintiffs, having been executed by the mayor of the City, without any specific authority so to do, was absolutely void. The adoption of a mere motion that a lease be made does not carry with it authority to any particular person to execute the lease.

But we think the first question discussed conclusive of this case. We respectfully submit that city councils in Alaska are without the power of leasing the public wharves of the Municipality and thereby divesting the municipality and themselves of all power of control over its public property, and that the order granting a temporary injunction should

be reversed and the case remanded, with instructions to dismiss the plaintiffs' bill.

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Attorney for Appellant.